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No. 80-656

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

APPLING COUNTY, GEORGIA, JAUNICE PRESLEY, DAVID BURKE, BRICE BEECHER, BEN WEAVER, NORMAN HOLLIS and JOHNNIE THORNTON

Petitioners,

versus

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA and GEORGIA POWER COMPANY,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S MEMORANDUM BRIEF IN OPPOSITION

L. CLIFFORD ADAMS, JR.
GERALD W. BOWLING
HEARD, LEVERETT & ADAMS
66 Luckie Street
Suite 520
Atlanta, Georgia 30303
(404) 522-8510

THOMAS S. GRAY, JR.
OLIVER, MANER & GRAY
P. O. Box 8343
Savannah, Georgia 31402
(912) 236-3311

Attorneys for Respondent
Municipal Electric Authority of Georgia

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This brief on behalf of Respondent, Municipal Electric Authority of Georgia (the "Authority") is submitted in opposition to the Petition for Writ of Certiorari filed herein by Appling County, Georgia, et al. The Petition is wholly without merit as shown in the Order of the District Court, holding, *inter alia,* that the Constitutional claims of the Petitioners are clearly insubstantial. The Petitioners have burdened the Court here with a lengthy Petition which, as was also the case in their appeal to the Fifth Circuit, points to no specific error by the District Court in its understanding or application of the

prevailing law in respect to the tax exemption of the Authority which Petitioners seek to bring in question.

The facts as stated by the Petitioners are somewhat misleading in several respects, and we here briefly restate the facts as we see them to be material to a consideration of the Petition. The pleadings show that the Authority was created by the General Assembly of Georgia by Act approved March 18, 1975 (Ga. Laws 1975, p. 107, as amended by Ga. Laws 1975, p. 2000; Ga. Laws 1980, p. 1128) (Ga. Code Ann., Ch. 34B-4) ("the Act"), and is a public corporation and an instrumentality of the State of Georgia created for the purpose of furnishing an adequate, dependable and economic source or sources of bulk electric power to political subdivisions of the State of Georgia which owned and operated electric distribution systems on the effective date of the Act. Since the beginning of central station electric service, the providing of electric power has been a proper public purpose under the laws of the State of Georgia. *Heilbron v. Mayor and Council of Cuthbert,* 96 Ga. 312, 23 S.E. 206 (1895); *Moultrie v. Colquitt County Rural Electric Co.,* 211 Ga. 842, 89 S.E.2d 657 (1955). In furtherance of its public purpose, the Authority entered into power sales contracts with 47 political subdivisions of the State of Georgia to supply their bulk power requirements, and on February 7, 1977, purchased from Georgia Power Company a 17.7% undivided fee simple interest in the Edwin I. Hatch Nuclear Plant located in Appling and Toombs Counties. Said conveyance was by General Warranty Deed and Bill of Sale and by General Assignment and Bill of Sale. Further, the Authority contracted with Georgia Power Company to construct and operate the plant for the Authority with respect to its 17.7% interest. The Act specifically authorizes the joint ownership of electric generating facilities with other persons and corporations, public or private, and specifically authorizes the Authority to employ agents for the construction and ope-

ration of such facilities. (Act pp. 107, 119; Ga. Code Ann. §34B-407(g)).[1]

The Act provides that the creation of the Authority and the performance of its purposes "... are in all respects for the benefit of the people of this State and that the Authority is an institution of purely public charity performing an essential governmental function and all property of said Authority is hereby declared and shall in all respects be considered to be public property and title to such property shall be held by the Authority only for the benefit of the public ... and all of the property of ... the Authority ... shall be and hereby are declared to be nontaxable for any and all purposes by the State

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(1) The pertinent part of Ga. Code Ann. §34B-407(g) reads as follows:

"... In any such exercise of such powers, rights, and privileges jointly or in common with others with respect to the construction, operation, and maintenance of electric generation or transmission facilities, the Authority may own an undivided interest in such facilities with any other party or parties, public or private. The Authority may enter into an agreement or agreements with respect to any such electric generation or transmission facility with the other party or parties participating therein, and any such agreement may contain such terms, conditions and provisions consistent with the provisions of this Act as the parties thereto shall deem to be in their best interests. Any such agreement may include, but need not be limited to, provisions for the construction, operation, and maintenance of such electric generation or transmission facility by any one or more of the parties to such agreement which party or parties shall be designated in or pursuant to such agreement as agent or agents on behalf of itself and one or more of the other parties thereto or by such other means as may be determined by the parties thereto, and may include provisions for a method or methods of determining and allocating, among or between the parties, costs of construction, operation, maintenance, renewals, replacements, improvements and disposals with respect to such facility...."

of any of its political subdivisions." (Act, pp. 107, 118; Ga. Code Ann. §34B-406.)

The District Court sifted through the complaint and weighed it against the measure of sufficiency recently recognized again by the Fifth Circuit, that is: ". . . a complaint which alleges the existence of a federal question establishes jurisdiction, so that a dismissal for lack of jurisdiction is appropriate only when the court decides that a claim is frivolous or insubstantial, i.e., a claim that has no plausible foundation, or when the court concludes that a prior Supreme Court decision clearly forecloses the claim. *See Bell v. Health-Mor, Inc.*, 549 F.2d 342, 344 (5th Cir. 1977); *Hilgeman v. National Ins. Co.*, 547 F.2d 298, 300 (5th Cir. 1977)." Dist. Ct. Order, Pet. App. I, p. 11a.

Under this standard the District Court is bound by the Supreme Court's well-established rule from *Carmichael v. Southern Coal & Coke Co.*, 310 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245 (1937), ". . . when subject to judicial scrutiny [the exemption] must be presumed to rest on [a rational] basis if there is any conceivable state of facts which would support it." The District Court concluded: ". . . Under this standard, the Plaintiffs' Constitutional claims are clearly insubstantial, and lack any plausible foundation. The Georgia statutes creating and governing MEAG, Ga. Code Ann. §34B-401 et seq., are patently rational and are free from arbitrary discrimination." Dist. Ct. Order, Pet. App. I, p. 12a.

Moreover, the Supreme Court of Georgia in 1976 had considered the Act, and specifically the provision exempting the Authority's property from *ad valorem* taxation, in the case of *Thompson v. Municipal Electric Authority of Georgia et al.* 238 Ga. 19, 231 S.E.2d 720 (1976), and found such exemption to be valid. The District Court was mindful of this fact. *See* District Court Order, Pet. App. I, p. 12a, footnote 2. To grant the relief

which Petitioners have requested, it would be necessary to ignore or overturn important segments of Georgia law — laws applicable to fee simple ownership of an undivided interest in real estate, laws of agency, and laws relating to the authority of the General Assembly of Georgia to exempt public property in the ordering of state and local taxing priorities. Such is clearly not warranted in the circumstances.

Wherefore, Respondent prays that the Writ of Certiorari be denied.

Respectfully submitted,

L. CLIFFORD ADAMS, JR.

GERALD W. BOWLING

HEARD, LEVERETT & ADAMS
66 Luckie Street, N.W.
Suite 520
Atlanta, Georgia 30303
404/522-8510

THOMAS S. GRAY, JR.

OLIVER, MANER & GRAY
P. O. Box 8343
Savannah, Georgia 31402
912/236-3311

Attorneys for Respondent
Municipal Electric Authority
of Georgia

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing RESPONDENT'S MEMORANDUM BRIEF IN OPPOSITION for Respondent Municipal Electric Authority of Georgia were served by mailing same in an envelope bearing sufficient first class postage for delivery to each of the following counsel of record:

EMMETT P. JOHNSON, ESQUIRE
Baxley, Georgia 31513

DURWOOD T. PYE, ESQUIRE
Pye, Groover & Dailey
2801 Buford Highway, N.E.
Suite 375
Atlanta, Georgia 30329

Attorneys for Petitioners

and

ROBERT P. EDWARDS, JR., ESQUIRE
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

Attorneys for Respondent
Georgia Power Company

This day of November, 1980

GERALD W. BOWLING
Counsel for Respondent
Municipal Electric Authority
of Georgia